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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Preemption of State and Local Zoning and	)	MM Docket No. 97-182
Land Use Restrictions on the Siting,	)	
Placement and Construction of Broadcast	)	
Station Transmission Facilities	)	

To: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION

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Summary

The National Association of Broadcasters ("NAB") and the Association for Maximum Service Television ("MSTV") respectfully urge the Commission to adopt the rule attached as Appendix B to the Commission's *Notice of Proposed Rule Making* in this proceeding. This rule would preempt, under certain circumstances, state and local government restrictions on the placement, construction and modification of broadcast transmission facilities. In response to the specific questions raised by the Commission, NAB and MSTV submit the following comments:

* The proposed rule properly focuses on establishing reasonable procedural guidance to the exercise of local zoning and land use authority. Nonetheless, the Commission should exercise substantive preemption over regulations dealing with human exposure to RF emissions, interference with telecommunications signals and consumer electronics devices caused by RF emissions, and tower marking and lighting because the federal government has adopted comprehensive regulatory schemes in these areas.

* The proposed rule properly extends to all broadcast facilities, regardless of whether they are directly related to the implementation of DTV service. The proposed rule also properly extends to broadcasters in all markets. There is no rational basis for excluding any particular class of broadcasters from any substantive preemption adopted by the Commission. Moreover, in the interests of generally promoting the broadcast services as well as creating a uniform national policy regarding the resolution of zoning and land use disputes, the procedural aspects of the rule should also apply to all broadcasters.

* The Commission should exercise preemptive authority over state and local regulations in the area of the potential environment and human effects of exposure to RF emissions. The FCC has adopted comprehensive regulations concerning the RF emissions which fully and adequately protect the environment and humans from RF emissions. State and local regulations which are different from or inconsistent with the federal regulations should be preempted.

* The time limits for action by state and local governments contained in the proposed rule are reasonable. The time limits properly are graduated to reflect the nature of the local interests that are at issue. In cases of applications concerning previously-approved facilities, the approval process should be abbreviated. In other instances, such as the construction of new broadcast towers, it is appropriate to adopt slightly

longer time periods to govern state and local decision making. In sum, what is needed is a "shot clock" to require dispositive state and local action on an expeditious basis.

* The FCC should adopt alternative dispute resolution procedures in connection with its preemption of state and local zoning and land use regulations. Such procedures have been utilized by the Commission in other fora as a means of resolving disputes and will serve to allow the prompt resolution of "good faith" disputes concerning the application of federal regulations.

* Regardless of the record concerning zoning and land use restrictions which is established in this docket, the record currently before the Commission which has been created in other dockets supports the adoption of a preemption rule for broadcasters. The record created in other preemption proceedings demonstrates vividly the scope and manner of restrictions that states and local governments impose on the siting and construction of federally-approved communications facilities. In this regard, NAB and MSTV request that the Commission take official notice of the record which has been established in the following dockets: FCC 97-264 (Comments regarding Petition for Declaratory Ruling of the Cellular Telecommunications Industry Association); RM-8577 (Amendment of the Commission's Rules to Preempt State and Local Regulation of Tower Siting for Commercial Mobile Radio Service Providers); CC Docket No. 85-87 (Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations) and; ET Docket No. 95-59 (Preemption of Local Zoning Regulation of Satellite Earth Stations); ET Docket 93-62 (Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation Effects of Radiofrequency Radiation).

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Comments of the National Association of Broadcasters and the Association for Maximum Service Television

The National Association of Broadcasters ("NAB") and the Association for Maximum Service Television ("MSTV"), by their attorneys and pursuant to 47 C.F.R. §§ 1.415, 1.419, hereby jointly file the following comments in response to the *Notice of Proposed Rule Making*, FCC 97-296, released August 19, 1997 ("*Notice*"), issued in the above-captioned proceeding.

NAB is a non-profit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry. MSTV is a non-profit, incorporated association of television station owners dedicated to preserving the technical integrity of the television broadcast service. NAB and MSTV jointly filed the Petition for Further Notice of Proposed Rule Making ("Petition") proposing the adoption of a rule preempting, under certain limited circumstances, state and local zoning and land use restrictions on the placement, construction and modification of broadcast transmission facilities.[1] This Petition led the Commission to issue the *Notice* which is the subject of this proceeding.

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[1] For purposes of these Comments, "broadcast transmission facilities" is defined to mean towers, broadcast antennas, associated buildings, and all equipment cables and hardware used for the purpose of or in connection with federally authorized radio or television broadcast transmissions. This same definition is utilized in the proposed rule attached as Appendix B to the *Notice*.

Preliminary Statement

As the Commission recognizes, its ambitious digital television ("DTV") build-out requirements may well conflict with an array of state and local regulations that could add lengthy delays and obstacles to the siting and modification of broadcast transmission facilities needed to support a prompt roll-out of DTV and to further broadcast service generally. At the same time, the Commission also recognizes the important state and local government roles in zoning and land use matters and the interests of state and local governments in the protection and welfare of their citizenry. The preemption rule proposed by NAB and MSTV strikes a reasonable accommodation of these conflicting concerns.

In this regard, the proposed rule provides for only limited preemption of state and local land use and other regulations that restrict the placement, construction and modification of broadcast transmission facilities. The rule is principally concerned with the need for procedural constraints on state and local zoning and land use decisions concerning broadcast facility siting and construction rather than with the substantive content of nonfederal regulations. For example, the rule provides specific time limits for dispositive state and local government action in response to requests for approval to place, construct, or modify broadcast transmission facilities. These time limits are set to ensure that applications for construction authority are processed by state and local government officials in an efficient and expeditious manner and that state or local inaction, by itself, will not frustrate the important federal objectives concerning broadcast facility construction.

The proposed rule does also specifically preempt certain substantive types of tower restrictions -- including restrictions based on radio frequency ("RF") emissions; interference with other telecommunications signals and consumer electronics equipment; and tower marking and lighting. However, each of these substantive issues is expressly within the sphere of federal

government control and regulation. Because the FCC and/or the Federal Aviation Administration ("FAA") comprehensively regulate issues such as interference, tower lighting and marking, and RF emissions exposure, preemption of local authority over these matters is appropriate.

Finally, the proposed rule provides procedures for the expeditious review of tower siting decisions, including arbitration by the Commission upon request of an aggrieved broadcaster. This review process will encourage broadcasters and local authorities to work together to the greatest extent possible to resolve differences over tower issues while, at the same time, providing a mechanism for resolving intractable disputes. The use of alternative dispute resolution procedures should allow decisions on tower siting issues to be resolved quickly, an issue of paramount concern to broadcasters.

The principal questions raised by the *Notice* concern not whether the Commission has authority to preempt state and local regulations, but how it should do so to accomplish the rapid deployment of DTV and further broadcast service generally, yet refrain from preempting legitimate spheres of state and local regulation.[2] The Commission seeks comment on several specific questions in the *Notice.* NAB and MSTV respond to each of these questions in turn below.

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[2] The Commission correctly concludes that it has jurisdiction to preempt local zoning and land use regulations insofar as such regulations "stand[] as an obstacle to the accomplishment and execution of the full objectives of Congress or where . . . preemption is 'necessary to achieve [the Commission's] purposes' within the scope of [its] delegated authority." *Notice*, ¶ 12 (citing and quoting *City of New York v. FCC*, 486 U.S. 57, 63 (1988); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-69 (1986)). As the Commission notes: "To the extent that state and local ordinances result in delays that make it impossible for broadcasters to meet our construction schedule and provide DTV service to the public, important Congressional and FCC objectives regarding prompt recovery of spectrum would be frustrated." *Notice*, ¶ 14. *See generally* 47 U.S.C. § 151 (purpose of the Act includes "to make available, so far as possible,... a rapid, efficient Nation-wide and world-wide radio communication service with adequate facilities").

1. Should preemption focus on the actions or the authority of local governments?

In the *Notice*, the Commission seeks comment concerning whether the preemption rule should focus on specific actions of states and local governments which are preempted or, alternatively, specific authority which is preempted.[3] The rule proposed by NAB and MSTV does both. Although its focus is on "action" -- in the sense that the rule contains procedural requirements concerning the disposition of requests to construct and alter broadcast transmission facilities -- the rule also provides for substantive preemption with regards to the potential environmental or health effects of RF emissions, interference effects, and tower lighting and marking requirements.

NAB and MSTV continue to believe that their proposed rule harmonizes the federal and state interests and properly strikes a balance between the preemption of "actions" versus the preemption of "authority." As stated, the focus of the rule is on providing procedural requirements for state and local government action -- that is, getting the state or local government to act on broadcast construction requests in an expeditious manner.[4] Thus, the proposed rule requires state and local governments to act on broadcast facility siting and construction requests within a "reasonable period" of time after requests are made. "Reasonable period of time" is defined with reference to the complexity of the request and the potential effect of the request on legitimate state and local zoning

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[3] *See Notice*, ¶ 18.

[4] Perhaps the single most commonly-expressed complaint of broadcasters with respect to state and local zoning and land use compliance is the extraordinary length of time that is sometimes required to navigate state and local procedural hurdles and to obtain a decision on a particular application. To utilize an analogy from basketball, the proposed rule is intended to provide a "shot clock" to govern the exercise of legitimate state and local authority. Adoption of a "shot clock" will eliminate the ability of states and local governments to unreasonably delay or withhold action on (*viz.* a "four corner's offense") broadcast construction applications. This is a common tactic utilized by local officials to dodge difficult but important issues particularly when those issues contain a political component. The construction moratoria of indefinite duration imposed by many communities are examples of this approach.

and land use interests. Requests to modify existing broadcast facilities where no change in overall height or location is proposed and requests to strengthen or replace an existing broadcast transmission facility must be acted on within 21 days. Requests to relocate existing facilities to an alternate location within 300 feet, to consolidate two or more existing facilities, or to increase the height of an existing tower must be acted on within 30 days. All other requests must be acted on within 45 days.

The specific "authority" preempted by the proposed rule is narrowly defined to include only those areas which are the subject of comprehensive federal regulatory schemes. As the Commission concludes in its *Notice*, the Communications Act of 1934, as amended, comprehensively provides for regulation of radio frequency interference; therefore, a rule preempting state and local zoning regulations based on radio frequency interference would simply codify existing law.[5] The Commission has also issued comprehensive regulations governing human exposure to RF emissions.[6] Similarly, the FCC has adopted comprehensive rules and regulations governing tower painting and lighting.[7] These regulatory areas, because they are comprehensively regulated by federal law, should

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[5] *Notice*, ¶ 12.

[6] *See* Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation Effects of Radiofrequency Radiation, *Report and Order*, ET Docket 93-62, 96-326 (Released: Aug. 1, 1996) ("*R&O*"), *First Memorandum Opinion and Order*, FCC 96-487 (Released: Dec. 24, 1996) ("*First MO&O*"), *Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 97-303 (Released: August 25, 1997) ("*Second MO&O and NPRM*"). The *Second MO&O* affirmed the Commission's decision to adopt limits for Maximum Permissible Exposure (MPE) and localized, partial-body exposure of humans based on criteria published by the National Council on Radiation Protection and Measurements (NCRP) and by the American National Standards Institute/Institute of Electrical and Electronics Engineers, Inc. (ANSI/IEEE). *See also* OET Bulletin No. 65 (Ed. 97-01).

[7] *See, e.g.*, 47 C.F.R. § 17.21 *et seq.* ("Subpart C: Specifications for Obstruction Marking and Lighting of Antenna Structures"). The FCC has incorporated standards for tower painting and lighting established by the FAA. Pursuant to these rules, each new or altered antenna structure to be registered on or after July 1, 1996, must conform to the FAA's painting and lighting recommendations set forth in the structure's FAA determination of "no hazard," as referenced in the following FAA Advisory Circulars: AC 70/7460-1H, "Obstruction Marking and Lighting," August 1,

properly be clarified as "off limits" from inconsistent state or local regulation.

Other than with respect to the specific areas of regulation identified above, the proposed rule would preempt any regulation which "impairs" the ability to construct or modify broadcast transmission facilities, unless the promulgating authority can demonstrate that the regulation is reasonable in light of (i) a clearly defined and expressly stated health or safety objective, and (ii) the federal interests in the construction of broadcast transmission facilities and fair and effective competition among competing electronic media. Therefore, "traditional" land use and zoning authority is reserved to state and local governments so long as restrictions on the siting and construction of broadcast transmission facilities can be justified in terms of health or safety regulations that are not inconsistent with the federal objective of fostering a vibrant and competitive electronic media market.

Any further attempt to categorize specific "authority" which should be preempted may sacrifice certainty and clarity. Undoubtedly, it would be nearly an impossible task for the Commission to enumerate the myriad of potential impermissible state and local governmental actions and regulations that may be preempted. Yet the failure to specify the precise authority preempted will lead to a hornet's nest of issues of concurrent jurisdiction. The result will be endless jurisdiction disputes, followed by litigation, and, in consequence, delay and unnecessary expense.

Therefore, NAB and MSTV believe that their proposed rule properly articulates areas of regulation which should not be the subject of state and local regulation, defines the scope of other permissible state and local regulations, and provides for reasonable procedural guidelines for state and local action which are necessary to secure the federal interest in the rapid development of DTV

1991, as amended by Change 2, July 15, 1992, and AC 150/5345-43D, "Specification for Obstruction Lighting

services throughout the United States.

2. Should preemption be limited to the construction of DTV facilities and relocation of those FM radio facilities displaced by DTV?

The Commission seeks comment on whether preemption should be limited to the construction of DTV facilities and the relocation of FM radio facilities displaced by DTV, or whether it should extend to other broadcast facilities. The rule proposed by the FCC in its *Notice* is not limited only to DTV-related construction but instead embraces all broadcast transmission facility construction.

NAB and MSTV continue to believe that, while imminent DTV construction deadlines established by the Commission certainly support the rule's applicability to DTV-related construction, the rule should apply more broadly.

Certainly the benefits of any substantive preemption (i.e., preemption over specific areas of regulatory authority) adopted by the Commission should extend to all broadcasters. While the focus of the proposed rule is on requiring states and local governments to act on tower applications expeditiously, the rule also proposes categorical preemption of regulations based on the potential environmental or health effects of RF emissions, interference with other telecommunications signals and consumer electronics devices, and tower marking and lighting requirements. In the event that the Commission concludes that it has regulated comprehensively with respect to these areas and that, therefore, preemption of inconsistent state and local regulations is appropriate, the Commission should prohibit the application of such state or local regulations to all broadcasters, not just broadcasters directly affected by the transition to DTV.

Equipment," July 15, 1988. *See* 47 C.F.R. § 17.23.

In addition, the procedural requirements of the proposed preemption rule should apply generally to all broadcast facilities. Failure to adopt uniform preemption will likely lead to protracted and unproductive disputes concerning whether a particular project is "DTV-related" -- an issue which, in light of the massive construction effort that will be required by the implementation of DTV, may be difficult to resolve. Obviously, the transition to DTV will require *every* television broadcaster to undertake construction activity of some type in order to install digital transmitters and antennas. According to NAB/MSTV estimates, 66% of all existing television broadcasters will require new or upgraded towers in order to support DTV services. This translates into about 1000 towers that will need to be constructed or upgraded in the conversion to DTV. In connection with this construction, NAB/MSTV expect that hundreds of FM antennas will have to be relocated.[8] The end result is that the conversion to DTV will cause "ripple" effects throughout the broadcast industry, as the placement of a DTV antenna causes the relocation of an FM antenna, which causes the displacement of a third antenna at another location. FM broadcasters should not have to "prove" that a particular relocation is "caused" by the transition to DTV in order to benefit from the procedural requirements of the preemption rule.

Moreover, towers must be built or modified and new DTV equipment must be purchased, all in a relatively short time span. At the same time, the day-to-day business of analog television and radio broadcasters must go on. To require broadcasters and state and local regulatory bodies to act

[8] As stated in the NAB/MSTV Petition, according to the FCC's FM and TV engineering databases, as of this past spring there were 1,320 FM antennas, or 18% of the total number of FM stations, that are located at the same geographical coordinates as a least one TV antenna. *See* Petition, p. 6 and Engineering Statement of Lynn Claudy, ¶ 19. Presumably, hundreds of these stations will have to be relocated as a consequence of the installation of DTV antennas.

in accordance with two or more contrary sets of procedures and substantive laws will create confusion and frustration, leading to delays and additional expense, precisely what is sought to be avoided in this proceeding. Because of the scarcity of skilled construction crews and materiel, delays and additional expenses incurred by broadcasters in any part of their business may well have a deleterious effect on the timely provision of DTV and the early implementation of broadcast service generally. Many broadcasters operate stations in more than one market or jurisdiction, further complicating scheduling and the allocation of resources. A single national framework for tower and broadcast facility construction will better promote and realize the institution and improvement of broadcast service generally, both existing analog and DTV transmissions.

While it is true that the Commission's DTV build-out requirements underscore the need for a rule which preempts burdensome and duplicative state and local government regulations and procedures, this need is shared by all broadcasters, whether they are implementing DTV or not. In other contexts, the FCC has adopted preemption rules without any express Congressional authorization or introduction of new technology. For example, in a 1983 order, the Commission preempted local land use regulations which "have the effect of interfering with, delaying, or terminating" the operation of SMATV systems.[9] In 1985, the Commission preempted local land use regulations which prohibited the installation of amateur radio antenna facilities.[10] In 1986, the Commission adopted a rule preempting local regulation of satellite earth stations that differentiated

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[9] Earth Satellite Communications, Inc., *Memorandum Opinion, Declaratory Ruling and Order*, FCC 83-526, 55 RR 2d (Pike & Fischer) 1427 (Released: Nov. 17, 1983).

[10] Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, *Memorandum Opinion and Order*, FCC 85-506, 58 RR 2d (Pike and Fischer) 1452 (Released: Sept. 9, 1985).

between satellite receive-only antennas and other types of antenna facilities.[11]

Moreover, the Commission has been urged on several previous occasions to adopt a preemption rule of general application, but, thus far, it has declined to adopt such a rule on the grounds that the issue has not been ripe for decision in the particular docket in which it was raised.[12] The issue of general preemption is squarely before the Commission in this docket, and, for the reasons discussed above, the preemption rule should not be limited to DTV-related construction and the relocation of FM radio facilities displaced by DTV, but should instead be extended to all broadcast transmission facilities.

3. Should preemption be limited to the top markets in which the DTV roll-out schedule is most aggressive?

NAB and MSTV continue to believe that their proposed preemption rule should apply uniformly to all markets.

As pointed out above in response to question number two, there is no rational basis for adopting substantive preemption over RF emissions, interference, and tower lighting and marking, yet confining the reach of such preemption to particular markets. In the event that the Commission concludes that substantive preemption is appropriate, that preemption should be extended to all

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[11] Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, *Report and Order*, CC Docket No. 85-87, 59 RR 2d 1073 (Released: Feb. 5, 1986), ¶ 11.

[12] *See, e.g.*, NAB's Petition for Partial Reconsideration, CC Docket No. 85-87 (March 17, 1986); Preemption of Local Zoning Regulation of Satellite Earth Stations, *Notice of Proposed Rule Making*, IB Docket No. 95-59, FCC 95-180, 2 CR (Pike and Fischer) 2175 (Released: May 15, 1995), ¶ 75.

broadcasters.

Moreover, even in markets which are not among the top ten, compliance with the applicable implementation deadlines will be difficult. As described in the NAB/MSTV Petition, television broadcasters face an array of obstacles in the conversion to DTV, including lack of trained construction crews that are capable of constructing and modifying the tall towers that will be necessary in many cases.[13] If faced with state and local regulatory delays as well, it may be impossible to meet the implementation deadlines, even in non-top ten markets.

Finally, for the reasons described above in response to question number 2, the preemption rule adopted by the Commission should be a rule of general application -- that is, it should apply to the siting, construction and modification of all broadcast transmission facilities. To the extent that such a generally applicable rule is adopted, there is no basis for confining the effectiveness of the rule to a particular market.

4. Should there be preemption regarding exposure to RF emissions?

NAB and MSTV continue to believe that the preemption rule adopted by the Commission should preempt state and local regulation of human exposure to RF emissions.

The National Environmental Policy Act of 1969 (NEPA) requires agencies of the Federal Government to evaluate the effects of their actions on the quality of the human environment. To meet its responsibilities under NEPA, the Commission has adopted comprehensive requirements for evaluating the environmental impact of its actions, including its authorization of RF emitting facilities.[14] One of several environmental factors addressed by these requirements is human exposure

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[13] *See* NAB/MSTV Petition, pp. 7-9.

[14] *See, e.g., infra*, note 4.

to RF energy emitted by FCC-regulated transmitters and facilities.

The Commission's environmental processing rules, 47 C.F.R. §§ 1.1301-1.1319, generally require broadcast applicants to perform the necessary analysis (e.g., calculations and/or measurements) to ascertain whether a particular transmitting facility or device complies with the Commission's adopted RF exposure guidelines set forth in section 1.1307(b), in effect at the time the broadcaster files for an initial construction permit, license, or renewal or modification of an existing license. If on the basis of the applicant's analysis the applicant determines that the facility complies (or will comply) with the Commission's adopted RF guidelines, the applicant certifies compliance as part of its application. If, on the other hand, the applicant determines that operation of the facility or device will not comply with the RF guidelines, the applicant is required to prepare an Environmental Assessment, and undergo environmental review by Commission staff unless the applicant amends its application so as to comply with the Commission's adopted RF guidelines.[15]

It should be emphasized that these procedures are an outgrowth of years of experimentation and refinement by the Commission. As broadcast towers and transmission facilities have become more complicated, the rules have required more thorough analyses from broadcasters. For example, for antennas that are co-located with other antennas, the licensees must perform analyses which take into account the additional RF emitting sources.

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[15] *See* 47 C.F.R. §§ 1.1311; *see also* 47 C.F.R. §§1.1308, 1.1309, 1.1314-1.1317.

Although it is true that the Commission's regulatory scheme with respect to human exposure to RF emissions is based on broadcast diligence and self-certification, this system has worked well for a number of years. Broadcasters take their self-certification obligation extremely seriously; indeed, they are required to by the Commission's rules.[16] Misrepresentation is treated by the Commission as a very serious offense which can lead to fines or, possibly, loss of license -- in addition to criminal penalties.[17]

The Commission should prohibit any attempt by states and local governments to impose additional certification or paperwork requirements on broadcasters concerning RF emissions compliance beyond the present FCC requirements.[18] The certification made by broadcasters with respect to compliance with RF emissions standards is required by the Commission to be made in every significant Commission filing, including applications for construction permits, license modifications and license renewals. These applications are available for inspection by the public at each station's public inspection file; therefore, the information regarding RF emissions compliance is already accessible to the public, including local officials. Likewise, the Commission should reject attempts by states and local governments to impose additional requirements such as consultation fees and environmental assessment studies. The current FCC RF emissions guidelines are comprehensive and

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[16] *See* 47 C.F.R. § 73.1015 ("No applicant, permittee or licensee . . . shall make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission").

[17] *See* 47 C.F.R. § 1.1413 (b) ("If any person shall in any written response to Commission correspondence or inquiry or in any application, pleading, report, or any other written statement submitted to the Commission . . . make any misrepresentation bearing on any matter within the jurisdiction of the Commission, the Commission may, in addition to any other remedies, including criminal penalties under Section 1001 of Title 18 of the United States Code, impose a forfeiture pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b)").

[18] *See, e.g., Second MO&O and NPRM* (seeking comment on proposed procedures for filing and reviewing requests for relief from state and local regulations on the placement, construction or modification of wireless service facilities based either directly or indirectly on the environmental effects of RF emissions).

are adequate to apprise state and local governments of the environmental implications of broadcast construction applications.

5. Should there be preemption of local regulation intended for aesthetic purposes?

It is essential that the proposed federal rule preempt local regulation intended for aesthetic purposes. Obviously, the very nature of broadcast transmission requires towers that will be tall enough to provide required coverage. These towers cannot be disguised (like cellular and microwave transmitters) or miniaturized (like satellite dishes) or buried (like cables). In order to provide free television broadcasts to as many Americans as possible in a market-driven cost-effective manner, transmitting towers must, in some circumstances, be constructed where they may not appeal aesthetically to all local eyes. Failure to preempt local aesthetic regulations while preempting these other local actions may well result in a rash of new aesthetic ordinances implemented principally to evade the federal preemption of other state and local rules and regulations. In the end, failure to preempt purely aesthetic regulations will be an exception that swallows the rule. After all, "aesthetic" concerns are not capable of distillation to objective standard; what to one person is an engineering marvel may be an eyesore to another.

Moreover, all broadcast applications for construction permits, licenses, and license renewals currently require an examination of several objective aesthetic factors. For example, the General Environment Worksheet, which must be completed by broadcasters in connection with their environmental review, requires an assessment of factors such as: (1) high intensity lighting; (2) wilderness area or wildlife preserve designations; (3) endangered species habitats; (4) effects on

districts, sites, buildings, structure or objects significant in American history, architecture, archaeology, engineering or culture that are listed in the National Register of Historic Places or that are eligible for listing; (5) effects on Indian religious sites; and (6) effects on environment matters such as wetlands, forestation and water supplies. In the event that evaluation of these factors demonstrates a "significant environmental impact," the broadcaster must submit an Environmental Assessment which provides a detailed evaluation of the environmental effects caused by the application.

In light of this rigorous review, no further review by state and local officials of "aesthetic" factors is necessary or appropriate.

6. Are the time frames proposed by Petitioners appropriate?

The proposed rule provides for an expedited procedural timetable for state and local action on broadcast transmission facility placement, construction and modification requests. Failure to act on the request -- i.e., failure to reach a dispositive decision -- within the specified time period would result in the request being deemed granted.

As pointed out previously in response to question number one, the time limitations built into the proposed preemption rule are graduated based on the complexity of the request and the potential effect of the request on legitimate state and local zoning and land use interests. Therefore, the least objectionable requests -- those involving preexisting towers -- must be acted on within 21 days. Slightly more involved requests -- such as those to move broadcast transmission facilities less than 300 feet, to consolidate two or more existing facilities, or to increase the height of an existing tower -- must be acted on within 30 days. All other requests must be acted on within 45 days.

While these time constraints are tight, NAB and MSTV are confident that state and local governments have the ability to adhere to these procedural limitations. NAB/MSTV estimate that approximately two-thirds of television broadcasters will need to construct new or modified facilities to accommodate DTV, with nearly all TV stations required to do *some* type of construction, be it only the addition of a DTV antenna to an existing tower.[19] Obviously, these facilities are dispersed throughout the country. In many cases, state and local governments will only have to deal with one request at a time. Only in the larger markets will there be more than just a few facilities to be constructed, and, given the rapid roll-out of DTV, simultaneous requests. Yet these larger markets are precisely where the bureaucracy is correspondingly larger to handle the increased number of construction requests.

In order to comply with the DTV construction schedule in the *Fifth Report and Order*,[20] the maximum 45-day response period proposed in the rule is critical. The tight time constraints will ensure that state and local regulatory authorities concentrate their energies on requests as they come in, thereby expediting the entire process. Were the rule to allow 90 days, as the Commission seeks comment on,[21] rapid deployment of DTV would be jeopardized. It must be kept in mind that in some cases, the initial decision of the state or local government will only be the first step in the process. There must be time for an aggrieved broadcaster to seek review of state and local decisions before the Commission or through the courts.

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[19] *See* Petition at p. 8.

[20] Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Fifth Report and Order*, MM Docket No. 87-268, FCC 97-116 (Released April 21, 1997).

[21] *See Notice*, ¶ 23.

7. Should the FCC serve as a mediator or arbitrator of disputes between local and state bodies and broadcasters and/or tower owners?

NAB and MSTV continue to believe that the FCC should adopt alternative dispute resolution ("ADR") procedures which will facilitate the amicable resolution of tower siting disputes. In the case of disputes which are not capable of amicable resolution, of course, the Commission will retain jurisdiction to decide whether a particular state or local decision is consistent with federal guidelines.[22] Nonetheless, alternative dispute resolution procedures will aid the parties by bringing the Commission's expert resources to bear in resolving "good faith" disputes concerning the application of federal regulations. In other instances, ADR procedures will cause both parties to clearly articulate and express their areas of difference so that true issues of dispute can be identified.

The adoption of ADR procedures in this context would further the Commission's own policy of promoting non-judicial resolutions of disputes. Specifically, Section 1.18 of the Commission's rules provides as follows:

> §1.18 Administrative dispute resolution.
>
> (a) The Commission has adopted an initial policy statement that supports and encourages the use of alternative dispute resolution procedures in its administrative proceedings and proceedings in which the Commission is a party, including the use of regulatory negotiation in Commission rulemaking matters, as authorized under the Administrative Dispute Resolution Act and Negotiated Rulemaking Act.[23]
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> (b) In accordance with the Commission's policy to encourage the fullest possible use of alternative dispute resolution procedures in its administrative proceedings, procedures contained in the

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[22] *See, e.g.*, 47 C.F.R. § 76.1513 (establishing a 180 day review period for complaints concerning open video systems).

[23] *Citing* 5 U.S.C. 581-593 [*sic* -- the citation to 5 U.S.C. 581-593 should read 5 U.S.C. 571-583].

> Administrative Dispute Resolution Act, including the provisions dealing with confidentiality, shall also be applied in Commission alternative dispute resolution proceedings in which the Commission itself is not a party to the dispute.

In furtherance of this policy, the General Counsel's Office is charged with the duty of "advis[ing] the Commission in the preparation and revision of rules and the implementation and administration of . . . [the] Alternative Dispute Resolution Act[].[24]

The Commission has implemented ADR procedures in a number of other contexts, including the following:

* Competitive Access to Cable Programming. Allowing the parties to a dispute concerning competitive access to cable programming ten (10) days to elect ADR procedures upon notice of intent to designate the matter for hearing. (*See* 47 C.F.R. § 76.1003(m)(2)).

* Open Video Systems. Allowing the parties to an Open Video System complaint proceeding ten (10) days to elect to resolve the dispute through ADR procedures upon notice of intent to designate the matter for hearing. (*See* 47 C.F.R. § 76.1513(o)).

* Public Mobile Services. Parties to disputes concerning Public Mobile Services applications are "encouraged" to use alternative dispute resolution procedures to settle disputes. (*See* 47 C.F.R. § 22.135).

* Disputes Regarding Equipment Standards. Pursuant to Section 273 of the Telecommunications Act of 1996, the Commission has established dispute resolution procedures for technical disputes which arise between a non-accredited standards development organization (NASDO) and any party who funds the activities of the NASDO concerning the establishment of industry-wide standards and requirements for manufacturing telecommunications equipment.[25]

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[24] *See* 47 C.F.R. §0.41(m).

[25] *See* Implementation of Section 273(d)(5) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 -- Dispute Resolution Regarding Equipment Standards, *Notice of Proposed Rulemaking*, FCC 96-87, GC Docket No. 96-42 (Released: March 5, 1996).

Consistent with the Commission's general policy favoring ADR procedures as well as the Commission's authorization of ADR in other contexts, the Commission should approve ADR in the context of disputes over tower construction and siting. In adopting such procedures, the Commission should provide a mechanism by which its staff may serve as mediators and/or arbitrators of such disputes. Many of these disputes concern technical matters which are within the expertise of the Commission. Access to such expertise will assist parties to "good faith" disputes to come to an amicable resolution of their differences.

Regardless of the ADR procedures which are adopted in the preemption rule, it is of critical importance that the Commission allow a direct right of review to the Commission of decisions concerning broadcast transmission facility construction. Currently, broadcasters that are aggrieved by decisions of states and local governments concerning broadcast facility construction can be caught up in endless bureaucratic delays and jurisdictional disputes between state and federal courts in attempting to obtain review of state and local decisions.[26] In order to break through this logjam, it is important that the Commission allow direct review of federal issues presented by state and local decisions regarding broadcast facility construction.

The proposed rule would accomplish this by allowing any broadcaster adversely affected by any final action (or failure to act) of a state or local government to petition the Commission for a declaratory ruling. The Commission would be required to act on such petitions within thirty (30)

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[26] In an unrelated context, Congress has recognized the difficulties that individuals face in obtaining review of state and local decisions affecting property rights. In legislation which has passed the House and is currently pending before the Senate, Congress would allow property owners whose rights may have been injured by state and local government action the option of a direct appeal to federal court. *See* H.R. 1534, 105th Congress, 1st Session ("The Private Property Rights Implementation Act of 1997") (passed House on Oct. 22, 1997 by vote of 248-178); S. 1204, 105th Congress, 1st Session ("The Property Owners Access to Justice Act of 1997"). This legislation is an outgrowth of concern that individuals currently face endless bureaucratic delay and procedural hurdles in obtaining review of local decisions. *See* 143 Cong. Rec. S9789 (daily ed., Sept. 23, 1997) (statement of Sen. Coverdale).

days. In such a proceeding, the Commission would determine whether the actions of the state or local government were consistent with federal law and regulations, including the preemption rule. In the event that the Commission determines that the action is inconsistent with federal law, it would have the authority to preempt the state or local decision.

8. What is the specific nature and scope of broadcast tower siting issues, including delays and related matters encountered by broadcasters?

In their Petition, NAB and MSTV cited several examples demonstrating the kind of procedural nightmares that broadcasters often face in attempting to site and construct broadcast towers and related facilities. NAB and MSTV expect that the Commission, in connection with this proceeding, will receive communications from numerous other broadcasters that describe similar difficulties with state and local governments.

Regardless of the new data which is submitted in this proceeding, the Commission is already well-acquainted with the obstacles which states and local governments often place in the way of federally-authorized communications facilities.[27] For example, comments filed in the Commission's receive-only satellite preemption proceeding[28] and the over-the-air reception device preemption

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[27] As the Commission is well-aware, such obstacles sometimes have nothing to do with the merits of a particular application, but instead can only be explained by reference to extraneous political or personal factors. To cite just one example, Capitol Broadcasting Company, a pioneer in digital television and the first station in the nation to broadcast an experimental digital signal, has for three months been unable to obtain the necessary approval (or even a hearing) from the local city council to move a 300-foot studio transmitter link tower located at its studio site from one side of the studio building to another, a distance of only approximately 170 feet. The city appears to be refusing to consider Capitol's application because of an unrelated legal action involving Capitol's news operation. *See generally* Declaration of Michael D. Hill, attached hereto.

[28] *See* Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, *Report and Order*, CC Docket No. 85-87, 59 RR 2d 1073 (Released: Feb. 5, 1986).

proceeding[29] are replete with examples of state and local efforts to obstruct the construction and placement of FCC-approved facilities and consumer devices necessary to receive the signals of such facilities. Similar examples may be found in the comments filed in the pending CMRS moratoria proceeding[30] as well as in the predecessor to this proceeding.[31]

For example, despite the explicit limitations placed on the exercise of state and local zoning and land use authority by Section 332(c)(7) of the Communications Act of 1934 (as amended by the Telecommunications Act of 1996), state and local governments have placed moratoria and other restrictions on the siting and construction of CMRS facilities. In support of its Petition for Declaratory Ruling, CTIA submitted detailed accounts of more than three hundred siting and zoning moratoria enacted by state and local governments.[32] In issuing its *Public Notice*, the Commission has tentatively concluded that it has the authority to preempt certain moratoria, especially moratoria of

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[29] *See* Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, IB Docket No. 95-59, FCC 96-328 (Released: August 16, 1996).

[30] *See Public Notice,* Supplemental Pleading Cycle Established for Comments on Petition for Declaratory Ruling of the Cellular Telecommunications Industry Association, FCC 97-264 (Released: July 28, 1997). *See, e.g.,* Comments of Southwestern Bell Mobile Systems, Inc., et al., September 11, 1997 (citing specific zoning and land use restrictions in the South Texas, New York, and Northeast regions); Comments of Nextel Communications, Inc., September 11, 1997 (citing specific examples from numerous states of moratoria and land use restrictions on tower siting and construction); Comments of Aerial Communications, Inc., September 11, 1997 (citing *de facto* moratoria such as 700% residential setback requirement for towers over 140 feet in height in Orange County, Florida).

[31] *See* Cellular Telecommunications Industry Association Petition for Amendment of Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities, RM-8577 (December 22, 1994); Amendment of the Commission's Rules to Preempt State and Local Regulation of Tower Siting for Commercial Mobile Radio Service Providers, CTIA's Petition for Rulemaking, RM-8577, *Public Notice*, Report No. 2052 (Released: Jan. 18, 1995). *See generally* Comments filed in response to *Public Notice* describing ordinances restricting the siting of wireless facilities based on concerns regarding the environmental effects of RF emissions.

[32] Petition for Declaratory Ruling, December 16, 1996.